No. 75-745

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHAYES VIRGINIA CORP., A WHOLLY OWNED SUBSIDIARY OF BCC INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In the underlying unfair labor practice case the Board found that Chayes Virginia Corp. (the Company), following an election conducted by the Board and certification of the International Union of Electrical, Radio and Machine Workers, AFL-CIO (the Union), had violated Sections 8(a)(1) and (5) of the National Labor Relations Act by refusing to bargain with the Union. The Board therefore ordered the Company to bargain with the Union upon request (Pet. App. B, pp. 7-17). The court of appeals enforced the Board's order after having found that the Board had not abused its discretion in overruling the Company's objections to the election (Pet. App. A, pp. 1-12).

2. The Company's basic contention is that the Board, and the court of appeals upon review, failed to measure the propriety of certain pre-election conduct attributable to the Union by the same standards it would have used

had that conduct been engaged in by the Company—as required by this Court's decision in *National Labor Relations Board* v. *Savair Mfg. Co.*, 414 U.S. 270. This contention is without merit.

The issue that the Board must resolve, when ruling upon objections to the conduct of a party during a representation election, is whether such conduct impeded the free and fair exercise by employees of their right to choose, or refrain from choosing, a bargaining representative. An analysis of the incidents relied upon by the Company in the present case shows that the Board properly concluded that the conduct complained of did not warrant the setting aside of the election.

The Company's first objection charged that a few days before the election the Union had conducted a coercive poll of the employees by telephone. As the court below pointed out (Pet. App. A, p. 5), however, the only evidence offered by the Company in support of this allegation tended to show that "one employee was telephoned concerning his union sympathies by an individual claiming to be a union agent and two other employees were telephoned by the same individual while they were not at home." Even assuming that the telephone calls were made as alleged, the Company made no effort to establish that the completed telephone call had been coercive in nature or that the calls together might have affected the election.[1]

[1]In discussing the alleged telephone calls, the court of appeals pointed out (Pet. App. A, p. 5) that the coercive potential of such calls is greater when made by an employer than when made by representatives of a union. Contrary to the Company's contention, however, that observation is not inconsistent with this Court's decision in *National Labor Relations Board* v. *Savair Mfg. Co.*, *supra*. Regardless of the identity of the party having engaged in the disputed preelection conduct, the Board is required in dealing with a challenge to a representation election to determine whether employee free choice has been infringed. In the present case, the Company simply failed to allege facts that would have supported a finding by the Board that the Union had engaged prior to the election in conduct that might have impeded a free and fair election.

The Company's second objection charged that the Union had engaged in an unlawful campaign involving threats against certain employees. One affidavit submitted by the Company alleged that a deaf employee had been called a "chicken" for refusing to support the Union and had been warned that all deaf employees would be laid off if the Union lost the election. The second affidavit alleged that an employee had been cautioned that "something" might happen to her home or car if she failed to sign a Union card. But as the court below noted (Pet. App. A, p. 6):

> During the Board's investigation, the deaf employee denied any threat connected with the election. Moreover, the record discloses that she tested out the validity of the prophecy of a layoff by reporting it to an officer of the company who assured her of its falsity and instructed her not to be concerned. The second affidavit, which was untimely submitted, fails to identify either the name of the fellow-employee or to establish that she was in any way associated with the union * * * .

The Company's remaining objections (see Pet. App. A, pp. 7-10) stood on no firmer basis. The record does not support the Company's contention that the Union improperly promised to obtain certain benefits for employees if it prevailed in the election, or that some of the circulars distributed by the Union contained material misrepresentations that might have affected the election's outcome. Finally, the Union was not guilty of misconduct in promising to waive initiation fees, if certified, for all employees working in the plant at the time of the election,

since the promise of an unconditional waiver of initiation fees does not constitute coercion affecting employee free choice in an election.[2] See *National Labor Relations Board* v. *Savair Mfg. Co., supra*; and Memorandum for the National Labor Relations Board in Opposition in *Benner Glass Company* v. *National Labor Relations Board* (No. 75-654, petition for certiorari pending).

The petition for a writ of certiorari should be denied.
Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

JANUARY 1976.

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[2]Since the Company failed to allege facts which, even if true, would have warranted the setting aside of the election, the Board did not abuse its discretion in disposing of the Company's objections without a hearing. See Pet. App. A, pp. 11-12; 29 C.F.R. 102.69(d).